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**In the Supreme Court of the United States**

OCTOBER TERM, 1975

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**JEFFERSON DOYLE, PETITIONER**

v.

**STATE OF OHIO**

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**RICHARD WOOD, PETITIONER**

v.

**STATE OF OHIO**

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**ON WRITS OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF OHIO, TUSCARAWAS COUNTY**

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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**ROBERT H. BORK,**  
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(1)

### QUESTION PRESENTED

The United States will address the following question:

Whether the Due Process Clause of the Fourteenth Amendment (and through it the self-incrimination provision of the Fifth Amendment) bars cross-examination of a defendant in a state criminal proceeding, who has given exculpatory testimony at trial, as to why he failed to offer such information previously.

### INTEREST OF THE UNITED STATES

This case presents questions closely related to those that were before this Court in *United States v. Hale*, 422 U.S. 171. Although the constitutional aspects of the issue presented in *Hale* were briefed at length by the parties to that case, the Court resolved the issue through the exercise of its supervisory powers over the administration of justice in the federal courts, ruling that, on the facts of that case (422 U.S. at 179), any probative value of the defendant's silence was outweighed by potential prejudice. Presumably, on different facts, a defendant's prior silence regarding the subject of his trial testimony might be deemed sufficiently probative to become a proper subject of cross-examination. Accordingly, there remains open, in federal as well as state prosecutions, the question whether inquiry into a testifying defendant's prior silence is absolutely barred from introduction in evidence on constitutional grounds.

Apart from this interest in the potential direct impact of the instant case upon future federal prosecutions, the resolution of the constitutional issues presented herein regarding the scope and impact of the privilege against compelled self-incrimination is likely to have significant application in other contexts and thus has a potential for impact upon a broad range of cases to which the United States is a party.

### STATEMENT

1. After separate jury trials in the Court of Common Pleas of Tuscarawas County, Ohio, both petitioners were convicted of selling marijuana, in violation of Ohio Rev. Code § 3719.44(D) (1971). Each was sentenced to a term of not less than twenty nor more than forty years' imprisonment. The intermediate appellate court affirmed the convictions, and the Supreme Court of Ohio denied petitioners' respective motions for further review.

The evidence showed that on April 29, 1973, William Bonnell, a state narcotics bureau informant, purchased ten pounds of marijuana from petitioners.<sup>1</sup> Bonnell paid for the marijuana with money which had been photocopied for identification by state narcotics bureau agents. After the transaction, petitioners departed in a rented car.

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<sup>1</sup> This brief summary of facts is taken from the trial transcripts and the opinion of the Court of Appeals, Fifth District, Tuscarawas County, in *Ohio v. Doyle*, No. CA 1108 (App. 49-57).

A short time later, local police and narcotics bureau agents stopped petitioners' car and placed petitioners under arrest. Petitioners thereupon were given *Miranda* warnings and taken to the county jail. Thereafter, petitioners refused to consent to a search of their car. A subsequent search of the car, pursuant to a valid warrant, elicited the photocopied money hidden under the front passenger-side floor-mat.

2. At their respective trials, each petitioner took the stand in his own defense and testified that he had been "framed" by informant Bonnell. At the trial of petitioner Doyle, Doyle claimed that he had planned to purchase a modest amount of marijuana from Bonnell but that he informed Bonnell that he could not afford to purchase the ten pounds which Bonnell offered him. Doyle further testified that Bonnell somehow smuggled the photocopied money into petitioners' car. At the trial of petitioner Wood, Wood gave the same exculpatory story and claimed that at the time of their arrest he and Doyle were attempting to return to Bonnell the money which he had "planted" in the car and to demand from him an explanation for why he had done so. Each petitioner also appeared as a defense witness at the other's trial and offered his story to corroborate the other's testimony.

At each trial, upon cross-examination of the defendant, the state prosecutor elicited the fact that the defendant had not offered his exculpatory story to the authorities at the time of his arrest, at his

preliminary hearing, or at any other time prior to the commencement of trial. The prosecutor elicited the same facts from each petitioner when he appeared as a defense witness at the corresponding trial. In addition, at petitioner Doyle's trial, the prosecutor elicited from Doyle the fact that he had not consented to the search of the car in which he had been riding when he was arrested; at petitioner Wood's trial, a government agent testified that Wood had not consented to the search of the car. Finally, during closing argument at each trial, the prosecutor stated that the defendant's failures to volunteer his exculpatory story at the time of his arrest or at any time prior to his testimony at trial, as well as his refusal to consent to the search of the car, raised the inference that his story had been recently fabricated.

At both trials, defense counsel unsuccessfully objected to all questions and statements regarding petitioners' prior silence and their failure to consent to the search. On appeal, the state court of appeals held that these questions and closing arguments were properly designed to test the credibility of the witnesses (App. 55-56; 61-62); the Supreme Court of Ohio denied petitioners' motions for further review (App. 67, 69).

#### ARGUMENT

In our brief in *United States v. Hale, supra*, we argued that the Fifth Amendment does not bar cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest. The Court

in *Hale* never reached the constitutional issue, however. Instead, it exercised its supervisory authority over the lower federal courts to weigh the probative value of such questioning against its potential for prejudice, and held that, on the facts of that case, the defendant's silence during custodial police interrogation after he had just been given *Miranda* warnings was insufficiently probative to justify admission of such evidence.

In the instant case, the constitutional question is in the forefront, since the state court has in effect determined that the evidentiary value of such questioning does outweigh its potential for prejudice. Accordingly, the constitutional arguments we set out in *Hale* are directly pertinent here. If our analysis is correct, it is permissible for state prosecutors to test the credibility of a defendant's testimony by eliciting the fact that he failed to explain seemingly incriminating circumstances at the time of his arrest. We accordingly rely upon the discussion of the constitutional issues contained in our brief in *Hale*. For the convenience of the Court, we have appended to this brief the relevant portions of our brief in *Hale*.

Respectfully submitted.

ROBERT H. BORK,  
Solicitor General.

JANUARY 1976.

## APPENDIX

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### SUMMARY OF ARGUMENT

The existence of an adequate opportunity to test the credibility of a defendant who takes the stand in his own behalf is crucial to the mission of a trial—accurate ascertainment of the truth. “The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.” *United States v. Nixon*, No. 73-1766, decided July 24, 1974, slip op. 24. Exceptions to the age-old principle demanding “every man’s evidence” should not be lightly created nor expansively construed. “Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means of ascertaining truth.” *Elkins v. United States*, 364 U.S. 206, 234 (Frankfurter, J., dissenting, cited with approval in *United States v. Nixon*, *supra*, slip op. at 25, n. 18).

In disallowing a form of cross-examination that exposes a testifying defendant's prior failure to explain seemingly incriminating circumstances, however, the court below ignored this precept and effec-

tively rendered a defendant immune from one of the "traditional truth-testing devices of the adversary process," *Harris v. New York*, 401 U.S. 222, 225. Here, respondent took the stand in his own defense and testified that on the morning of the robbery his wife had given him the cash that was found on his person soon after the robbery, for the purpose of obtaining some money orders with which she could pay some bills (Tr. 219). Cross-examination designed to discredit this explanation by revealing that respondent had failed to provide it to the police was, however, held to be violative of respondent's Fifth Amendment privilege.

We submit that the exclusion of such plainly relevant and probative evidence, going to the credibility of respondent's explanation of otherwise incriminating circumstances, finds no support in either the history or the logic of the Fifth Amendment privilege against self-incrimination. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that the defendant chose to remain silent during post-arrest questioning, once the defendant chooses to take the stand and testify in his own behalf the privilege no longer bars the introduction of such evidence for the limited purpose of impeaching his trial testimony. *Harris v. New York*, 401 U.S. 222; *Raffel v. United States*, 271 U.S. 494.

The court of appeals' majority erroneously relied on *Griffin v. California*, 380 U.S. 609, and *Miranda*

*v. Arizona*, 384 U.S. 436, as governing this case. *Griffin* is critically different, however, because it involved a non-testifying defendant, so that the "whole truth" policy of *Harris* and the waiver principles of *Raffel* were not implicated. As for *Miranda*, its principal thrust was to protect against impermissible coercion of arrestees; here, respondent did enjoy a free choice between voluntary silence and voluntary speech. Either election may, of course, carry potentially disadvantageous consequences, but that is no objection so long as the choice between them is not impermissibly compelled.

Nor is a suspect's election to remain silent during custodial interrogation impermissibly burdened by the possibility that, should he decide to testify at trial regarding the seemingly incriminating circumstances of his arrest, he may also be called upon to explain to the jury why he previously failed to offer such information to the police. Such a strategically disadvantageous consequence of invoking the privilege entails nothing more than a choice about trial tactics. It is a kind of consequence inherent in our adversary system, and one that has never been found to place an impermissible burden upon the right to remain silent. See *McGautha v. California*, 402 U.S. 183; *Williams v. Florida*, 399 U.S. 78. It in no way compels an accused to waive his privilege, in terms of criteria to which this Court has referred for ascertaining voluntariness, nor does it undermine the other values that

the privilege against self-incrimination has been thought to protect.

The court of appeals also predicated its decision on the notion that it is unfair to tell a suspect that he has a right to remain silent and then make some use of that silence against him. The *Miranda* warning does not, however, make any kind of promise to the arrestee that his silence will carry with it no adverse consequences. Indeed, it could not properly do so, since, apart from the consequence at issue in this case, other more substantial and more immediate adverse consequences are likely to flow from failure to tender a satisfactory explanation of incriminating circumstances, foremost among which is the enhanced likelihood that there will be a criminal prosecution of the arrestee. Finally, with regard to the question of fairness, the court of appeals has erroneously equated the standards for assuring an informed *waiver* of a constitutional right with those that should govern a decision *not* to waive an approach that is not only unprecedented and unjustified, but revolutionary in its ramifications.

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## ARGUMENT

### I. THE JURY SHOULD BE PERMITTED TO ASSESS THE CREDIBILITY OF A DEFENDANT'S TESTIMONY BY LEARNING OF HIS PRIOR FAILURE TO EXPLAIN SEEMINGLY INCRIMINATING CIRCUMSTANCES TO THE POLICE

#### A. *The necessity to test the credibility of a defendant's testimony and to obtain the "whole truth" requires that the jury be allowed to consider his prior failure to tell it to the police*

A defendant who takes the stand places himself in a fundamentally different position from one who does not. Once on the stand, he is subject like any other witness to cross-examination designed to assure the reliability of his testimony. Moreover, by choosing to tell his side of the story to the jury, he waives his Fifth Amendment privilege not only as to the part of his story that he wishes the jury to hear, but as to the *whole* story. We submit that both principles—the necessity for testing the truth of a defendant's testimony and the quest for the "whole" truth—make it proper to cross-examine a defendant as to why he failed to tell his story to the police.\*

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\* The guilty criminal defendant has substantial incentives to commit perjury, in view of the personal consequences of a conviction. At the same time, the constraints that normally operate to discourage witnesses from prevarication apply with diminished force to the criminal defendant. These factors make it especially important to allow thorough probing of the veracity of the testifying defendant.

1. Once he takes the stand and testifies on his own behalf, a defendant may be cross-examined like any other witness as to matters reasonably related to the subject of his direct examination<sup>7</sup>—including matters that otherwise could not be brought to the jury's attention, such as prior convictions, *Spencer v. Texas*, 385 U.S. 554, 561; evidence unlawfully seized, *Walder v. United States*, 347 U.S. 62; refusals to testify on his own behalf at prior trials, *Raffel v. United States*, 271 U.S. 494, 499; or inconsistent statements made during police interrogation without proper *Miranda* warning, *Harris v. New York*, *supra*.

A defendant's silence during police interrogation should be no exception to this principle. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that an accused chose to remain silent during interrogation or failed to offer an innocent explanation of seemingly incriminating circumstances, when a defendant testifies the jury should be permitted to assess the credibility of his story by learning that he previously declined to tell it to the authorities. A defendant's alibi or exculpatory testimony—often central to his defense—should not be any more immunized from accurate evaluation than the testimony of any other witness. Nor should an accused's choice to remain silent during police interrogation thereby license him to give

<sup>7</sup> See 3A Wigmore, *Evidence* § 890 (McNaughton rev. ed. 1961) and cases cited therein.

false testimony at trial, free from the possibility that he may be called upon to explain why he failed to give the exculpatory information to the authorities at the time of his arrest.

*Harris v. New York*, *supra*, provides strong support for this proposition. There, the defendant, charged with selling heroin to an undercover police officer, took the stand in his own defense and denied the sale. On cross-examination, the defendant was asked about certain statements he had made to the police that were inconsistent with his trial testimony. Those statements had not, however, been preceded by proper *Miranda* warnings, and they therefore had to be deemed presumptively coerced in violation of the defendant's Fifth Amendment privilege. *Miranda v. Arizona*, 384 U.S. 436. The trial judge permitted the questioning, instructing the jury that the statements attributed to the defendant by the prosecution could be considered only in determining credibility and not as evidence of guilt.

This Court held that the Fifth Amendment does not bar the introduction of such statements, although made without adequate *Miranda* warnings, for the limited purpose of impeaching a defendant's trial testimony. While such statements are irrebutably presumed to be compelled in derogation of the Fifth Amendment when admitted as evidence of guilt, the Court in *Harris* reasoned (401 U.S. at 224-225):

It does not follow \* \* \* that evidence inadmissible against an accused in the prosecution's

case in chief is barred for all purposes \* \* \*. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

The Court observed that prohibiting the use of such statements would be tantamount to licensing a defendant to resort to perjured testimony in reliance on the government's disability to challenge his credibility. "But that privilege [against self-incrimination] cannot be construed to include the right to commit perjury \* \* \* by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 225-226.

If the jury may test a defendant's credibility by reference to prior inconsistent statements elicited in presumptive violation of his Fifth Amendment privilege, it follows that the jury should be permitted to test a defendant's credibility by reference to his prior inconsistent silence at the time of his arrest, when there has been no such violation.<sup>8</sup> Had respondent

<sup>8</sup> Two of the circuits that have considered the question whether a defendant's silence at police interrogation can be used to impeach his credibility at trial have concluded, in light of *Harris*, that such cross-examination is constitutionally permissible. Thus, in *United States v. Ramirez*, 441 F. 2d 950 (C.A. 5), certiorari denied, 404 U.S. 869, the defendant testified at trial that he had been coerced into selling heroin by threats of harm from strangers. On cross-examination he admitted that he had never told the police this fact, and in closing argument the prosecutor urged that this silence was not

given the police an explanation of the source of his money contrary to the one he subsequently gave at

consistent with the conclusion that the trial testimony was truthful. On appeal, the Fifth Circuit, relying on *Harris*, stated (401 U.S. at 954):

"Once [the defendant] elected to testify and assert the defense of coercion he became subject to the 'traditional truth-testing devices of the adversary process,' including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest."

See also, *United States ex rel. Burt v. State of New Jersey*, 475 F. 2d 234 (C.A. 3); *Agnellino v. State of New Jersey*, 493 F. 2d 714 (C.A. 3); *United States v. Quintana-Gomez*, 488 F. 2d 1246 (C.A. 5); contra: *United States v. Brinson*, 411 F. 2d 1057 (C.A. 6); *Robideau v. Rhay*, 431 F. 2d 880 (C.A. 9); *Fowle v. United States*, 410 F. 2d 48 (C.A. 9); *Johnson v. Patterson*, 475 F. 2d 1066 (C.A. 10), certiorari denied, 414 U.S. 868; *Deats v. Rodriguez*, 477 F. 2d 1023 (C.A. 10). In its latest pronouncement on the subject, the Fifth Circuit seems to have retreated slightly from its broad holding in *Ramirez*, *supra*. See *United States v. Fairchild*, C.A. 5, No. 74-2097, decided January 8, 1975.

The position of the Third Circuit is not altogether clear. In *Burt*, *supra*, the defendant testified that the shooting death for which he had been charged with murder had been accidental. The prosecution elicited on cross-examination the fact that, when he had been arrested for an unrelated crime soon after the shooting, the defendant had not sought to secure assistance for the victim. The lead opinion in *Burt* held that the cross-examination was permissible because the defendant's silence during police interrogation had occurred before he stood accused of the murder. The other two members of the panel, however, issued a concurring opinion on the ground that *Harris* allows impeachment by prior silence at a police station.

In *Agnellino*, *supra*, the defendant made statements to the police but failed to indicate the source of stolen goods that were found on his property. He testified at trial that he had purchased them. During closing argument, the prosecutor com-

trial, it is clear under the *Harris* holding that such explanation would have been admissible to impeach his credibility even had it not been preceded by *Miranda* warnings. The same reasoning would seem to apply even more forcefully to the instant case, where the police acted entirely properly in providing respondent full *Miranda* warnings, no statements of any kind were elicited, and there is no question of coercion.

Moreover, while the use of *statements* elicited without *Miranda* warnings may, as this Court recognized in *Harris*, give rise to an arguably "speculative possibility that impermissible police conduct will be encouraged thereby" (401 U.S. at 225)—a possibility outweighed, in the Court's view, by the benefit to the fact-finding process of giving the jury an opportunity to assess the credibility of the defendant's testimony—cross-examination such as that in the instant case, which merely apprises the jury of a defendant's *silence* before the police, obviously does not present even that nominal danger.

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mented upon the defendant's prior failure to provide this information to the police. The lead opinion, relying upon the concurring opinion in *Burt*, held that the prosecutor's comment was permissible. The other two members of the panel, however, concurred on the basis that what the defendant had *told* the police was inconsistent with his trial testimony. They viewed *Burt* as a situation in which the defendant's *conduct* in not seeking assistance for the shooting victim was inconsistent with his testimony at trial that the shooting had been accidental.

2. By the same token, a defendant's silence during police interrogation should be no exception to the related principle that a defendant who offers himself as a witness thereby waives his Fifth Amendment privilege *without reservation*. "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Raffel v. United States, supra*, 271 U.S. at 497. Having chosen to waive the privilege at trial, therefore, a defendant should not at the same time be insulated from consideration of the import of his prior silence before the police. He "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events"—such as his prior silence before the police—" \* \* \* without subjecting his silence to the inferences to be naturally drawn from it." *Caminetti v. United States*, 242 U.S. 470, 494.

There is sound policy in requiring a defendant who offers himself as a witness to do so without reservation and in allowing the prosecution to probe all seemingly incriminating circumstances relevant to the defendant's testimony, including the fact that he previously failed to give the police the exculpatory information he gives the jury. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel, supra*, 271 U.S. at 499. A defendant who becomes a witness in his own behalf benefits from the opportunity to tell the jury his side

of the story. But the opportunity should not be one-sided:

[An accused's] voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between them all. *Any* voluntary disclosure by the accused \* \* \* distorts the probative picture. \* \* \* The accused has the choice at the outset [whether or not to take the stand], unhurried and with full knowledge that all questions will relate to his incrimination [8 Wigmore, *Evidence*, § 2276, pp. 459-460 (McNaughton rev. ed. 1961)].

A fair balance of advantages requires that the jury have an opportunity to hear the entire story—including the fact that the defendant previously failed to tell his side of the story to the police.

The decision of the court of appeals in the instant case squarely conflicts with the analysis of this Court in *Raffel v. United States*, *supra*, and affirmance in the case at bar would, we submit, require the Court to overrule *Raffel* or confine that precedent to its specific facts. In *Raffel* this Court held that it was permissible to cross-examine a defendant as to his reasons for failing to take the stand at a prior trial, when his purpose in testifying at the second trial was to rebut a witness who testified at both trials. Raffel's first trial, in which he had failed to testify, resulted in a mistrial; at his second trial on the same charge the government presented the same witness who had

appeared at the first trial. This time, Raffel chose to take the stand and rebut the witnesses' testimony. Although comment upon a defendant's failure to take the stand was prohibited by statute and judicial decision (18 U.S.C. 3481; *Wilson v. United States*, 149 U.S. 60), the judge then asked Raffel questions that required him to disclose that he had not testified at the first trial and to explain why he had not done so. The second trial resulted in conviction.

The Court, in an opinion by Justice Stone, determined that the Fifth Amendment privilege provides no basis for excluding the defendant's admission at the second trial that he had failed to take the stand at the previous trial because "I did not think there was enough evidence to do it" (271 U.S. at 495, note). The Court rejected the theory that the defendant's original immunity should be held to survive his appearance at the second trial (*id.* at 498-499):

The only suggested basis for [extending the immunity beyond the first trial is the] pressure on the accused to take the stand on the first trial for fear of the consequences of his silence in the event of a second \* \* \*. [But even if, on his first trial, he were to weigh the consequences of his failure to testify \* \* \* in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or at his option, testify

fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantive manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.

Once the defendant takes the stand at the second trial, therefore, he effectively waives his immunity retroactively as to both trials, since "[w]e can discern nothing in the policy of the law against self-incrimination which would require the extension of the immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify." 271 U.S. at 499.

If a defendant under such circumstances waives his Fifth Amendment privilege respecting inquiry into his failure to testify at a prior trial, it follows that a defendant who takes the stand at his trial also waives any Fifth Amendment privilege he may have relating to his silence during police interrogations. Like Raffel's choice not to testify at his first trial, respondent in his encounter with the police chose not to tell them where he obtained the money found on his person. We submit that his omission, like Raffel's, can properly be revealed to the jury to aid them in assessing his credibility. Any other rule unacceptably enhances the prospect that jury verdicts will be based upon fabricated accounts not adequately tested by cross-examination.<sup>9</sup>

<sup>9</sup> *Stewart v. United States*, 366 U.S. 1, cited by the majority below, is not inconsistent with *Raffel*. In *Stewart*, a defendant

B. *Neither Griffin nor Miranda requires the result reached by the court of appeals*

Neither *Griffin v. California*, *supra*, nor *Miranda v. Arizona*, 384 U.S. 436, both relied upon by the majority below, is inconsistent with this analysis. At most, those cases express the proposition that a defendant may, in accord with his Fifth Amendment privilege, remain silent without his silence being used against him *as evidence of guilt*. But that proposition is fully consonant with use of a defendant's silence as evidence of his prevarication on the witness stand.

1. The defendant in *Griffin* was convicted of first degree murder after a jury trial in which he chose not to take the stand in his own defense. The trial court instructed the jury that, while the defendant had a constitutional right not to testify, and his failure to deny or explain incriminating circumstances of which he had knowledge did not create a presumption of guilt or relieve the prosecution of any of its burden of proof, the jury could take defendant's failure to testify as to such evidence into consideration "as tending to indicate the truth of such evidence and as in-

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who pleaded not guilty by reason of insanity took the stand and made various unintelligible statements. During cross-examination the prosecutor elicited the fact that the defendant had not testified during two previous trials, which had resulted in convictions that were reversed on appeal. In ruling this cross-examination improper, the Court noted that neither *Raffel* nor *Grunewald* was applicable, since the cross-examination in *Stewart* sought to discredit the claim of insanity rather than to impeach the defendant's testimony.

dicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable" (380 U.S. at 610). In closing argument, moreover, the prosecution made several allusions to the defendants' failure to deny or explain incriminating circumstances. On those facts, the Court reversed Griffin's conviction, holding that such comments to the jury about a defendant's failure to testify violated the defendant's Fifth Amendment privilege.

The Court in *Griffin* was concerned about the direct use of a defendant's decision not to testify (which was undeniably an invocation of his privilege against self-incrimination) as affirmative evidence of guilt. "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into *evidence against him* is quite another." 380 U.S. at 614 (emphasis added). The Court neither said nor implied that the same rule would apply to evidence used to impeach a defendant's trial testimony, nor did the Court mention *Raffel, supra*, which permits comment upon a defendant's failure to take the stand at a previous trial for the purpose of impeaching his testimony at a subsequent trial. Indeed, it seems clear that the decision in *Griffin* did not call into question the holding in *Raffel*, since at the time *Raffel* was decided it had long been the rule in federal courts that no comment could be made upon a defendant's failure to

take the stand. See *Wilson v. United States, supra*; 18 U.S.C. 3481.<sup>10</sup>

Moreover, the situation in *Griffin* presented a problem that is absent in circumstances such as *Raffel* or the instant case. Under the approach followed by the California courts in *Griffin*, the jury was expressly encouraged to infer that unexplained incriminating circumstances were true, and the defendant, since he did not testify, had no opportunity to rebut the inference. As a result of invoking the privilege in *Raffel* (and of remaining silent in the instant case), however, the defendant at most risked being called upon to explain why he previously failed to take the stand or provide information. The jury may disbelieve his explanation, and their disbelief will cast doubt upon the veracity of his present testimony. On the other hand, the jury may be sufficiently satisfied with the explanation that any unfavorable inference otherwise flowing from his previous silence is effectively rebutted. Thus, in *Raffel*, as in the instant case but unlike *Griffin*, the defendant had an opportunity to eliminate any unfavorable inference resulting from his silence, and the accuracy of the inference was "subject to the normal testing process of an adversary trial." *Michigan v. Tucker*, 417 U.S. 433, 449.

2. The court of appeals' reliance on *Griffin* was

<sup>10</sup> The Court has specifically reserved the related question whether an accused is constitutionally entitled to have the jury instructed that his silence must be disregarded. *Griffin, supra*, 380 U.S. at 615, n. 6. See also *Bruno v. United States*, 308 U.S. 287, 292.

predicated on its conclusion that respondent, like Griffin, was "exercis[ing] his constitutional right to remain silent" and that the cross-examination constituted an attempt to penalize him for assertion of this right (Pet. App. A, p. 10A). The court of appeals did not independently analyze the validity of its focal postulate that respondent was exercising a "constitutional right" when he remained silent and was impermissibly penalized therefor when cross-examined, but simply relied upon the following dictum contained in a footnote in *Miranda* (384 U.S. at 468, n. 37):

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

In considering whether this dictum should now be elevated into a constitutional holding, the circumstances of its utterance merit attention: (1) None of the cases before the Court in the *Miranda* group involved defendants who had stood silent or whose silence had been used in any manner against them at trial; (2) since the thrust of the Court's rationale in *Miranda* focused upon the inherently coercive effects found by the Court to accompany custodial interrogation, the characterization of an arrestee's voluntary silence as an exercise of the Fifth Amendment privilege was logically unrelated to the theme of co-

ercion that dominated the Court's opinion; and (3) the quoted statement contained no explication of the basis for the conclusion it contained, and the case law cited in support of the conclusion (by "cf."), including *Griffin*, dealt with quite distinct situations.

In our view, the Fifth Amendment privilege does not confer any *per se* "right to remain silent" as a personal entitlement that the government is affirmatively obliged to fulfill. The obligation that the Fifth Amendment privilege imposes upon the government is a negative one to avoid compulsion, and the correlative right is to be free from being *compelled* to speak. Cf. *Michigan v. Tucker*, *supra*. The right to be free from improper compulsion is by its nature not a right that the individual *exercises* but, rather, one that he enjoys.<sup>11</sup> Accordingly, it was not only too facile, but also erroneous, to characterize the cross-examination to which respondent was here subjected as a penalty for the exercise of a right.<sup>12</sup>

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<sup>11</sup> By contrast, the ordinary application of the self-incrimination provision requires an affirmative assertion of a colorable claim that the information sought of the individual may tend to incriminate him. See, e.g., *United States v. Kordel*, 397 U.S. 1, 10; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113.

<sup>12</sup> Theoretically, a similar analysis might be adduced in the case of the non-testifying defendant. However, the treatment of such a defendant's failure to take the stand as an "invocation" of the privilege against self-incrimination is firmly rooted in our law and reflects a reasonable presumption that such a defendant, if called to the stand, would invoke the privilege (he is, of course, not permitted to be called, because of the risk of impermissible prejudice if he is forced to claim possible

But even putting to one side these conceptual objections to the *Miranda* dictum and accepting it as a correct statement of the governing rule, it is properly understood as a bar to use of a defendant's silence during interrogation only in the government's case-in-chief. Following the logic of *Harris* and *Raffel*, and the principles of impeachment and Fifth Amendment waiver enunciated therein, the dictum would not prohibit asking a defendant on cross-examination, for the purpose of impeaching his trial testimony and eliciting his "whole" story, why he remained silent at the time of arrest.

## II. TESTING OF A DEFENDANT'S CREDIBILITY BY REFERENCE TO HIS PRIOR FAILURE TO GIVE HIS STORY TO THE POLICE NEITHER COERCES NOR IMPERMISSIBLY BURDENS HIS CHOICE TO REMAIN SILENT BEFORE THE POLICE, NOR IS IT UNFAIR

The court of appeals' conclusory assertion that use of an accused's silence at police interrogation to impeach his trial testimony is tantamount to a penalty upon the exercise of his Fifth Amendment privilege may also rest upon the unarticulated promise that

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self-incrimination before the jury). Whatever may be said of the exercise-of-right/penalty analysis in the *Griffin* context, however, we believe it would be inappropriate to extend it to the instant circumstances. Moreover, the situations are distinguishable insofar as the practice of comment and inference on a defendant's failure to take the stand entails a perceptibly greater hazard of prejudice flowing from the act of exercising the right (rather than simply the reasonable inferences arising from silence) than is present in the instant situation.

this consequence impermissibly burdens the choice to remain silent. If this was the premise, however, it is difficult to see where the impermissible burden arises. In the first place, it seems to us speculative and even unlikely as an empirical matter that a defendant will be deterred from remaining silent during police questioning by the mere possibility that, should he testify at trial, he then might be called upon to explain why he had not earlier offered his story to the authorities, and that the jury then might be dissatisfied with his explanation. Such an adverse consequence is so remote from the circumstance of police interrogation and—assuming the defendant has a reasonable explanation for why he chooses to remain silent—so unlikely, that it cannot be assumed to have a real deterrent impact upon the decision to remain silent during police interrogation.

But even if it had some such effect, it does not follow that this represents an impermissible burden on the exercise of a constitutional right; rather, we submit that it represents a proper consequence of the defendant's election to withhold any explanation of suspicious circumstances from the police, while choosing to provide one at trial. In the following discussion we show that this consequence is considerably less onerous than many other constitutionally sanctioned consequences of choosing to remain silent, and that it does not improperly compel an accused to speak against his will. We next show that there is nothing "unfair" in telling an accused that he may remain silent without telling him of all possible adverse con-

sequences that could flow from his decision to remain silent. Finally, we show that use of an accused's silence at the time of arrest to impeach his trial testimony does not jeopardize any of the values that the Fifth Amendment privilege is thought to protect.

- A. *The possibility of impeachment of a defendant's testimony by reference to his prior silence is a far less severe detriment than other disadvantages that this Court has held may constitutionally attach to exercise of the privilege against self-incrimination, nor does it constitute an impermissible compulsion to answer police questions.*

Even assuming that the Fifth Amendment privilege is the source of an arrestee's right to silence and that the privilege is fulfilled only when he is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will," *Miranda v. Arizona*, *supra*, 384 U.S. at 460; *Malloy v. Hogan*, 378 U.S. 1, 8, it does not follow that, in order to be "unfettered," the choice must be without consequence. On the contrary, "nothing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect." *Garrity v. New Jersey*, 385 U.S. 493, 507 (Harlan, J., dissenting).

1. We have already adverted to the "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan v. Tucker*, *supra*, 417 U.S. at 450. Manifestly, this includes knowledge of the defendant's failure to explain seemingly incriminating circumstances to the police at a time when the accuracy of the explanation could have been independently verified. On the other hand, from the standpoint of the accused, the possible adverse consequence at trial of remaining silent at police interrogation represents no hazard to the integrity of the privilege. Indeed, the consequence is nothing more than a nominal strategic disadvantage at trial: the possibility that, if he provides an alibi or exculpatory testimony at trial, he may be called upon to explain why he failed to offer information to the police, and the jury might be dissatisfied with his explanation.

This consequence simply does not amount to "compulsion" in the sense relevant for bringing the protection of the self-incrimination provision into play—i.e., the kind of circumstance "likely to exert such pressure upon an individual as to disable him from making a free and rational choice," *Garrity v. New Jersey*, *supra*, 385 U.S. at 497. It does not remotely resemble "the lurid realities which lay behind the enactment of the Fifth Amendment \* \* \*, the pain of incarceration, banishment, or mutilation," *Griffin v. California*, *supra*, 380 U.S. at 620 (Stewart, J., dissenting). It is a far cry from such "penalties" for

silence as third-degree torture, *Brown v. Mississippi*, 297 U.S. 278; prolonged isolation from family or friends in a hostile setting, *Gallegos v. Colorado*, 370 U.S. 49; physical and mental exhaustion from subjection to seemingly endless interrogation, *Watts v. Indiana*, 338 U.S. 49; loss of job, *Garrity v. New Jersey*, *supra*; or subjection to the kinds of police interrogation practices described in *Miranda* itself.

2. In fact, the possibility of such a strategic disadvantage at trial following upon silence during police interrogation is far less grave than many similar strategic disadvantages permissibly following upon invocation of the privilege in other circumstances. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. \* \* \* The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *McGautha v. California*, 402 U.S. 183, 213.

In *McGautha*, this Court faced a Fifth Amendment challenge arising from the dilemma confronting a defendant in a capital case under a state unitary trial procedure, in which guilt and sentence were decided by the jury in a single proceeding. The petitioner alleged, among other things, that his decision to exercise his constitutional right to avoid self-incrimination by not taking the stand at trial was unconstitutionally penalized by the fact that, by failing to take the stand, he lost his opportunity to be heard by the jury in mitigation of sentence and therefore suffered an

increased risk of being sentenced to death. Present also was the suggestion that other defendants facing the dilemma would feel compelled to waive their right not to testify on guilt or innocence in order to secure an opportunity to testify in mitigation of sentence. After assaying the various tactical choices facing an accused during and before a criminal trial, Justice Harlan concluded in his opinion for the court that the pressures that might cause similarly situated defendants to furnish arguably testimonial or incriminating information were no different from other pressures licitly generated by the innate complexity of criminal litigation (402 U.S. at 216-217):

We are thus constrained to reject the suggestion that a desire to speak to one's sentencer unlawfully compels a defendant in a single-verdict capital case to incriminate himself, unless there is something which serves to distinguish sentencing—or at least capital sentencing—from the situations given above. Such a distinguishing factor can only be the peculiar poignancy of the position of a man whose life is at stake, coupled with the imponderables of the decision which the jury is called upon to make. We do not think that the fact that a defendant's sentence, rather than his guilt, is at issue creates a constitutionally sufficient difference from the sorts of situations we have described.

The Court's rationale, realistically taking account of the accused's inherent need to make tactical judgments about the conduct of his defense to criminal

charges against him, would seem to apply with equal or greater force to the instant case. Just as a defendant's decision to waive his Fifth Amendment privilege for the purpose of mitigating his sentence is not constitutionally distinguishable from his decision to waive his privilege for the purpose of testifying in his own behalf, so too an arrestee's decision to "waive his privilege" at police interrogation for the far less drastic purpose of avoiding impeachment when he testifies at trial is constitutionally indistinguishable from his decision to waive his privilege at trial. Indeed, it is also procedurally indistinguishable, since an accused at police interrogation will feel induced to waive his privilege for this reason, if at all, only to the extent that he actually plans to waive his privilege at trial. Cf. *Brady v. United States*, 397 U.S. 742; *McMann v. Richardson*, 397 U.S. 759; *Parker v. North Carolina*, 397 U.S. 790.

An arrestee's evaluation of his options in deciding whether to speak or remain silent in response to police questions will depend upon many factors, such as his perception of the amount of information that the police already have obtained; his assessment of the likelihood that, should he cooperate with the police, he will be able to allay their suspicion and avoid subjection to criminal charges; or his expectation that by cooperation he may obtain more lenient treatment from the court. The decision whether to give exculpatory information is likely to be governed by the relative ease with which the authorities could verify the information and the likely impact of the

information on their assessment of his guilt or innocence. If a relatively simple explanation of suspicious circumstances can lead to an arrestee's quick release from the criminal process, it seems to us likely as an empirical matter that he would offer it. There is, in any event, no basis for concluding that one additional factor in the calculus—the likelihood that if the exculpatory information is not offered to the police, and the arrestee is prosecuted, and he decides at trial to take the stand in his own behalf, he may then be required to explain his prior silence—would materially influence the decision to speak or remain silent, let alone that it would be so weighty as to overwhelm his ability to make a rational and voluntary choice.<sup>13</sup>

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<sup>13</sup> In considering the question whether our position threatens to impose a constitutionally intolerable burden on the arrestee's decision to speak or remain silent, it is useful to distinguish between those who are guilty of the offense of which they are suspected and those who are not. While we do not suggest that the guilty have any less right to be free from governmental compulsion to speak than the innocent, we do submit that their decision to stand mute is likely to flow from the fact that they have no satisfactory explanation to tender; they are thus unlikely to feel compelled to provide an explanation to the police by the prospect that a fabricated story presented at trial will be subject to impeachment in this manner.

Many innocent persons who can offer an explanation for seemingly incriminating circumstances will, of course, elect to do so in the hope that such action will bring about a speedy and favorable termination of police suspicions. Such persons, like the guilty, clearly would be unaffected in their election to speak

3. *Williams v. Florida*, 399 U.S. 78, like *McGautha*, dealt with and sustained a procedure that imposed substantial adverse consequences on an exercise of the privilege. The Court in *Williams* upheld a notice-of-alibi statute requiring that a defendant who planned to present an alibi defense at trial provide the prosecution with the names of alibi witnesses before trial. It concluded that the statute does not unconstitutionally burden the defendant's Fifth Amendment privilege, even though failure to comply could result in exclusion of the alibi evidence at trial. The defendant in that case complied with the notice-of-alibi rule, and the state prosecutor used a deposition of the defendant's alibi witness to impeach the witness's testimony. The defendant claimed on appeal that his privilege

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by questions of possible future impeachment, since their choice is to speak in any event.

That leaves the group of arrestees who, although innocent and/or possessing a valid exculpatory explanation of seemingly suspicious circumstances, choose not to respond to police questioning—perhaps from fear or distrust of the police, perhaps from instinctive caution, timidity, or belligerence, perhaps in alherence to advice of counsel. Only as to this group could the possible future consequences of failure to respond to police inquiry materially affect the decision whether or not to speak. But these individuals already face immediate and substantial "compulsive" considerations, such as the prospect that their silence will result in the bringing of criminal charges against them. If they find the compulsion of such considerations resistible, it is hard to imagine that the remote and speculative possibility of adverse consequences at trial will provide meaningful compulsion to speak.

In short, it will as an empirical matter be the rare case indeed in which the possibility of future impeachment will actually operate to induce an arrestee to speak.

against self-incrimination was thereby violated, since he had been required to furnish the State with information useful in convicting him, under penalty of being prohibited from presenting his alibi witness. This Court disagreed (399 U.S. at 83-85, emphasis supplied):

The defendant in a criminal trial is frequently forced to testify himself \* \* \* in an effort to reduce the risk of conviction. \* \* \* That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against self-incrimination.

\* \* \* \* \*

At most, the rule only compelled petitioner to *accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense* \* \* \*.

Although pre-trial silence would of course have subjected Williams to the significant strategic disadvantage at trial of being barred from presenting an alibi defense, this consequence was not considered to impose an impermissible burden upon his election whether to remain silent.

The same logic would seem to compel a reversal in the instant case. If in consequence of maintaining

silence prior to trial a defendant may be barred *altogether* from presenting his alibi defense during trial, surely it is permissible—and far less burdensome—to attach as a consequence of a defendant's silence in response to police questions the possibility that he may be asked to explain his silence should he subsequently decide to offer an alibi or exculpatory testimony during trial. We reiterate in this connection that his failure to present his story to the police does not bar him from presenting his story to the jury, as silence would have in *Williams*: it simply entitles the jury to know, when he presents it to them, why he failed to give the information to the authorities at the time of his arrest. At most, an arrestee who plans to take the stand and tell his story at trial, if concerned that he might then be asked to explain his previous silence, may be somewhat more likely to “accelerate the timing of his disclosure” than otherwise. But this consideration is hardly tantamount to an unconstitutional burden upon his choice to remain silent.

Nor does this consequence of choosing to remain silent at police interrogation unconstitutionally burden a defendant's decision to take the stand at trial. A defendant who contemplates testifying in his own behalf is faced with many analogous—indeed, considerably more burdensome—disadvantages. Once he takes the stand, he cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination, see, e.g., *Brown v. United States*, 356 U.S. 148, *Fitzpatrick v. United States*, 178 U.S. 304, 314-316; he

may also be impeached by proof of prior convictions, *Spencer v. Texas*, *supra*, 385 U.S. at 561; and if his motion for acquittal at the close of the government's case is denied, he risks bolstering the government's case sufficiently to support an otherwise unjustifiable verdict of guilty if he puts on a defense, e.g., *United States v. Calderon*, 348 U.S. 160, 164.

In sum, whatever the inducement that might be felt by an arrestee to respond to police questioning because he otherwise might be asked to explain at trial why he had not provided the same explanation to the police (or that might be felt by a defendant at trial to forego his opportunity to take the stand for the same reason), such inducement “does not derive from any coercion of the State, instead it arises from the desire of the accused to act in his own enlightened self-interest.” *Segura v. Patterson*, 402 F. 2d 249, 253 (C.A. 10). An arrestee may feel slightly more induced to provide the police with exculpatory information than he otherwise would, or a defendant slightly more deterred from taking the stand, but only marginally so, and only to the extent that one course of action thereby becomes tactically more advantageous than another.

B. *It is not “unfair” to advise an accused that he has a right to remain silent and then use his silence to impeach his trial testimony*

Contrary to the assertion of the court of appeals, we see nothing “unfair” about advising an arrestee that he has a “right to remain silent” and then using

his silence to impeach his trial testimony although he had not been warned of this possible development. The fact that future impeachment use may result from silence does not make it untruthful to advise a suspect that he has a right to choose silence. An accused is *not* advised that his choice to remain silent cannot be used against him.

Moreover, as has already been indicated, a defendant faces many tactical disadvantages from choosing to remain silent at different stages of the criminal process, and there is no warrant for assuming that these choices are uninformed simply because all the possibly disadvantageous consequences stemming therefrom are not spelled out of every juncture. Cf. *Schneekloth v. Bustamonte*, 412 U.S. 218, 226. An accused who has an innocent explanation for otherwise incriminating circumstances certainly can be assumed to know that the consequence of choosing silence during police questioning is the rather drastic one of facing potential indictment, possible pretrial detention or bail, and trial.

The reason for requiring that an accused be told that he has a "right to remain silent" is to counteract what are thought to be coercive aspects of incommunicado police questioning. *Miranda v. Arizona*, *supra*, 384 U.S. at 457, 458. So long as the interrogation is fair and noncoercive, therefore, the accused presumably enjoys the "right" that he has been promised, and there is nothing misleading about advising him of this choice. Thus, in the instant case, there can

be no question that the goals of the *Miranda* decision were served when respondent was given the election between speaking voluntarily and voluntarily remaining silent.

To the extent that the court of appeals discerned unfairness because of a surmise that respondent may have decided to remain silent in reliance on an implied promise that his silence would not be used against him at trial, it presupposes that the decision to remain silent must be as carefully circumscribed with assurances that it be "informed" as is the decision to speak. But this is tantamount to a requirement that the government provide warnings about all the possibly adverse consequences that may flow from invocation of constitutional rights—a requirement that has no logical foundation in the recognized need to assure that *waiver* of constitutional rights be knowledgeable. To assume that an accused has been somehow tricked into invoking his "constitutional privilege" because he may not have been aware of certain disadvantages that accompany its invocation is a peculiar notion that has no analog in the law of voluntary waiver or entrapment.<sup>14</sup>

<sup>14</sup> If this were indeed the ground of the court's decision, it implies that the cross-examination at issue would pass constitutional muster had respondent been apprised at police interrogation that, should he decide to take the stand at trial, his prior silence could then be used to impeach his credibility. While we have no objection to modifying the warnings in the future to provide such notice if this Court deems such modification necessary to assure fairness to arrestees, it seems to us that the addition of such a statement might tend to confuse an arrestee about his constitutional rights and make it more difficult for him to understand the *Miranda* warnings.

*Johnson v. United States*, 318 U.S. 189, 197, cited by the majority below, dealt with a defendant's decision whether to invoke the privilege at trial during the course of his trial testimony, without first being warned by the court that it would allow the prosecution to comment upon any claim of privilege as evidence of the truth of unexplained incriminating facts. This Court held that it would be unfair to allow the jury to consider the fact that the accused invoked the privilege under these circumstances, where "that action may be said to *affect materially* the accused's choice of claiming or waiving the privilege and results in prejudice." *Ibid.*; emphasis added. Use of an arrestee's silence at police questioning for the limited purpose of impeaching his trial testimony, however, could not be said to "materially affect" his choice of claiming or waiving the privilege.

C. *The constitutional values and policies reflected in the privilege against self-incrimination were not impaired by the cross-examination of respondent*

The values thought to be reflected by the privilege against self-incrimination were comprehensively catalogued by the Court in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55:

The privilege against self-incrimination \* \* \* reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rath-

er than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment or abuses; our sense of fair play [and] \* \* \* respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F. 2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter for the guilty," is often "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162 [footnote omitted].

The cross-examination in the case at bar did not undermine these values.

a. A suspect whose failure to respond to police questions may be used to impeach his trial testimony is not exposed to the "cruel trilemma of self-accusation, perjury, or contempt." Respondent was free to make a false statement or to remain silent (as he in fact did), without any fear of invoking at least two of the penalties of the "cruel trilemma"—perjury and contempt.

b. Neither would the rule for which we contend subvert the preference for an accusatorial system of criminal justice. Confessions, so long as they are voluntarily made, have a recognized and valid place in our accusatorial system. Since, for the reasons we have previously discussed, the possible use of silence for impeachment does not impair the voluntary character (in the constitutionally relevant sense) of the

arrestee's election to speak or stand mute, the rule would not perceptibly alter the existing character of our accusatorial system.

c. Nor would such use increase the likelihood of inhumane treatment. Since it is an arrestee's *silence*, rather than any statements elicited by the police, that is used to discredit his trial testimony, the police have no incentive to violate the law and elicit statements coercively—an arguably “speculative possibility” of the rule enunciated in *Harris, supra*. Indeed, if such use of silence during custodial interrogation modifies police behavior in any direction, its likely tendency is to preserve an accused's right to remain silent by diminishing the determination of the police to procure a statement.

d. Nor are values of privacy jeopardized by such use of an accused's silence during police interrogation to impeach his trial testimony. Unlike a witness before a grand jury or legislative committee, whose appearance is not necessarily predicated on probable cause, a suspect lawfully arrested by the police has already satisfied the threshold requirement of probable cause. Moreover, by the time the prosecution makes reference to his silence, the individual has already gone to trial and has chosen to testify in his own defense. Indeed, he will choose to reveal personal information to the police, if at all, only to the extent that he plans to testify at trial and in so doing reveal the same personal information to the jury. Cf. *Williams v. Florida, supra*. This inducement to reveal personal information is therefore no more an assault

on his privacy than is necessarily entailed by his own tactical choices within the legitimate criminal justice process.

e. Finally, this case implicates no concerns about the trustworthiness of “self-deprecatory statements.” *Miranda, supra*, 384 U.S. at 455, n. 24, and 470; see 8 Wigmore, *Evidence*, § 2251 (McNaughton rev. ed. 1961). At most, an accused may decide that it is better to reveal his exculpatory evidence earlier (at police interrogation) rather than later (at trial). In no event, however, will the mere possibility that his silence at police interrogation might be subsequently used to discredit his testimony induce him to make unreliable self-deprecatory statements.

Under these circumstances—given that the only burden upon invocation of the privilege is a strategic disadvantage at trial of the sort inherent in our adversary system, and given the absence of any significant encroachment upon the policies or values reflected by the privilege—the decision below has failed to overcome the burden of justifying the exclusion of relevant evidence enhancing the jury's ability to assess the credibility of respondent's testimony. As Mr. Justice Frankfurter observed in *Nardone v. United States*, 308 U.S. 338, 340, “[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land.” No such justification can be demonstrated here.

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